

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.**

WRIT PETITION NO. 4041 OF 2002.

SICOM Ltd.

... Petitioner.

V/s.

The Union of India & ors.... Respondent.

Shri V.R. Dhond with Ashis Kamat i/b Kartikeya &
Associates for the Petitioner.

Shri S.S. Pakale with R.C. Master for the
Respondent.

CORAM : V.C.DAGA AND J.P. DEVADHAR, JJ.

DATED : 18.7. 2006.

JUDGMENT:

. This is a dispute between two wings of the
State. Each one is trying to claim priority over
the other.

The Facts :

. This petition is at the instance of
M/s.SICOM Ltd., the Company established by the
Government of Maharashtra for development of
industries under the provisions of the State
Financial Corporation Act, 1951 ("Act" for short);
which carries on business of financing industrial
undertaking in the State of Maharashtra,

2. The Government of India, in exercise of

powers conferred by sub-section (1) of section 46 of the said Act, issued Notification dated 11th December, 1986, extending provisions of various sections amongst other, section 27, 29, 30,31, 32A to 32F, 41,41A and 44 of the said Act of the said Act to the petitioner. The petitioner is, therefore, deemed State Financial Corporation within the meaning of section 46 of the said Act.

3. The petitioner, under an Indenture of Mortgage dated 22nd December 1986 has advanced a sum of Rs. 51,00,000/- by way of term loan to one M/s Nihal Cast Nylon Pvt. Ltd ("the borrower" for short). In consideration of the petitioner advancing the said term loan, the borrower created a first charge by way of legal mortgage of its fixed assets situate at its factory premises at Satara as well as the first charge by way of hypothecation/charge on the plant and machinery, electrical and other installation furniture and fixtures acquired by them lying in the factory; and/or to be acquired by them; described in the Schedule annexed to the said Indenture of Mortgage. The borrower, for having borrowed additional loan amount, has also executed second indenture of mortgage dated 22nd December 1986 so as to create charge on its movable and immovable assets.

4. The borrower committed several defaults in

repayment of principals as well as interest accrued thereon. Hence, the petitioners in exercise of its power under section 29 of the said Act issued notice to take possession of the said securities and, thereafter took actual possession thereof. However, since some repayments were made by the borrower to the Corporation as such Corporation appears to have handed over properties back to the borrower company on 20th April, 1994. However, the Company continued to commit defaults and hence by a recall notice dated 19th March, 1996, the petitioner recalled the entire outstanding dues; due and recoverable from the borrower.

5. The factual matrix reveals that the respondents/ the customs authorities found that a sum of Rs.48,08,242/- was recoverable by them from the borrower; as such they informed their recoverable dues from the borrower on account of duty liability to the petitioner-SICOM Ltd. and expressed their intention to attach and seize the properties of the borrower. The petitioner by its letter dated 11th September, 1996, immediately, informed the respondents that they had a mortgage of the properties of the borrower in their favour and that their properties were duly charged in their favour.

6 On being enquired, the borrower by its letter dated 22nd June, 1998 forwarded a copy of the notice issued by the respondents seeking to detain the securities of the petitioner for alleged claim of excise dues relating to the year 1991 and 1993 under purported exercise of its powers under rule 230 of the Central Excise Rules, 1944.

7. Being aggrieved by the approach of the respondents to take action against the petitioner's securities, despite putting to their notice the petitioner's charge thereon, the petitioner by its letters dated 21st July, 2002; 22nd August, 2000 followed by their Advocate's notice dated 8th January 2002, called upon the respondents to desist from taking any action against their securities and called upon them to remove their seal, if any, from the properties of the borrower. There was no response from the respondents. As such petitioner preferred to file this petition under Article 226 of the Constitution of India to enforce their claim.

Submissions :

8. Mr.Dhond, learned Counsel appearing for the petitioner submits that the attachment and/or measures sought to be taken by the respondents against the properties of the borrower, which

constitutes the petitioner's securities, is arbitrary, illegal and contrary to the petitioner's right to carry on business.

9. Mr.Dhond further submits that securities in its favour were created, way back in the year 1986. On the other hand, the purported claim of the respondents is recent one i.e. of the year 1991 or thereafter. The petitioner's charge on these assets (which are the petitioner's securities) has crystalized much prior in point of time, than the purported claim of the respondents- customs authorities.

10. Mr. Dhond urged that by virtue of the security documents i.e. the Indenture of Mortgage and the indenture of further charge, the properties of the borrower on which the respondents seek to levy attachment, are already charged and/or mortgaged in favour of the petitioner. By virtue of this charge and/or mortgage the petitioner is exclusively entitled to utilise and/or realise these properties/securities in the repayment of its dues (which are due and payable by the borrower). That the petitioner is entitled to have the entire sale proceeds of the securities so as to effect their recovery in toto leaving surplus if any, for the respondents. He submits that the custom authorities

cannot claim priority preferential charge on the properties of the borrower.

11. Mr. Dhond, Learned Counsel for the petitioner further submits that it is a settled law that the Government's preferential right for recovery of debts, over other creditors, is confined only to ordinary and/or unsecured creditors, and not secured creditors such as the petitioner. That in the present case, right of the petitioner as a secured creditor was complete and perfected much prior in point of time, than the alleged claim of the Excise Department is not in dispute. He, therefore, submits that at no point of time there was any conflict between the right of the petitioner which has arisen and/or prevailed rights of the Excise Department. The right of the petitioner is, therefore, prior, higher and liable to prevail over that of the Excise Department. Mr. Dhond placed reliance on the cases of Builders Supply Corporation vs. Union of India reported in AIR 1965 SC 1061; Bank of Bihar vs. State of Bihar AIR 1971 SC 1210 and that of Dena Bank vs. Bhikanbhai Prabhudas Parekh & Co. reported in (2000) 5 SCC 694.

12. In the submission of Mr. Dhond, the Excise Act, 1944 does not create any overriding charge and/or priority in favour of the respondents. The

right of the petitioner over the assets of the borrower, which constitutes the petitioner's securities, would, therefore, prevail over the alleged claim of the Excise Department.

13. Mr. Dhond has tried to point out that the claim of the petitioner and its right as a secured creditor arises under the provisions of the State Financial Corporation Act, 19151. This statute is a special enactment and enacted later in point of time vis-a-vis the Central Excise Act, 1944, which is a general Act. He submits that Section 46 of the Act also contains a non-obstante clause, favouring the right of the State Financial Corporation such as the petitioner. He, therefore submits that on this count also, the rights of the petitioner would prevail over that of the respondents.

14. In the aforesaid circumstances, Mr. Dhond learned Counsel for the petitioner submits that petitioner has a prior and higher charge than the purported claim of the respondent. He submits that despite being repeatedly put to notice of the petitioner's claim the respondent has illegally and without any authority sought to initiate action against the properties of the borrower, which constitutes the petitioner's securities. He, therefore, submits that for the reasons set out

hereinabove, only the petitioner is entitled to claim these assets. The illegal and arbitrary action of the respondents inasmuch as the Excise Department's attempts to enforce its purported claim against the petitioner's securities, violates not only the petitioner's right as a secured creditor, but also the petitioner's right to carry on business, guaranteed by Article 19(1)(g) of the Constitution of India.

15. Mr. Dhond submits that despite repeated requests to the respondents, did not remove their seal/ attachment. Such an approach on the part of the statutory authority clearly demonstrates the arbitrary and high handed approach of the respondent.

16. In the circumstances aforesaid, Mr. Dhond submits that petitioners' rights as a secured creditor are liable to be protected by this Court. The attachment and/or action of the respondents against the petitioner's security is arbitrary and contrary to law. He thus submits that the respondents are liable to remove their seal from the said properties and hand over to the petitioners the said properties which belong to the borrower and constitutes the security of the petitioner. He, therefore, prayed that the petition be allowed and

the relief as prayed for be granted in favour of the
petitioner

Per Contra:

17. Learned Counsel for the respondents submits that the action of the respondents in sealing the factory is in accordance with law, since the statutory provision viz. Rule 230 of the Central Excise Rules, 1944 framed under Central Excise Act, 1944 permits them to detain property for recovery of dues of the central excise department. In his submission, their dues will have a priority over the dues of the petitioner-Corporation. He, thus, submits that the action of the Central Excise Authorities in detaining factory and plants of the borrower was and is perfectly legal and proper. In order to support his contention, learned Counsel for the respondents relied upon judgment of the Apex Court in the case of Macson Marbles Pvt. Ltd. vs. Union of India, 2003(158) ELT 424 (SC). It is further submitted that dues of the Central Excise being dues of the crown will have a priority over the dues of the Corporation.

The Issue:

18. In view of the aforesaid rival contentions, the issue that needs consideration is: Whether dues

of the petitioner-Corporation will have priority
over the central excise dues?

The case Law:

19. In the case of **Bank of Bihar vs. The State of Bihar** AIR 1971 SC 1210, the issue for determination before the Apex Court was: whether rights of the pawnee as a pledgee were extinguished by seizure of sugar by the Government, which was in possession of the pledgee at the time of seizure. The Court has held that the pawnee has special property and a lien which is not of ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away the goods or its price. In otherwards, the Apex Court recognised the apex Court recognised a principle that the rights of the pawnee who had parted with money in favour of the pawnor on the security of the goods could not be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied.

20. The aforesaid judgment was a subject matter of consideration before the Apex Court in the case of **Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co.** (2000) 5 SCC 694, wherein the Apex Court after

reviewing to judgment in the case of Builders Supply Corporation vs. Union of India, AIR 1965 SC 1061 has reiterated principles laid down in the case of Bank of Bihar (cited supra) and has summed up law in the following words:

.1 There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.

2. The common law doctrine about priority of Crown debts which was recognised by Indian High Courts prior to 1950 constitutes "law in force" within the meaning of Article 372(1) and continues to be in force."

3. The basic justification for the claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.

4. The doctrine may not applying respect of debts due to the State if they are contracted by citizens in relation to commercial activities which may be

undertaken by the State for achieving socio-economic good. In other words, where the welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic government functions of the State and seeks to recover debts from its debtors arising out of such commercial activities the applicability of doctrine of priority shall be open for consideration.

21. The Apex Court in the above judgment further observed that the Crown preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity and good conscience (as applicable to India) do not accord to Crown a preferential right for recovery of its debts over a mortgagee or pledgee of goods or secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of

the subject, has prevailed already.

22. The Apex Court in the above judgment observed that in *Gils v. Grover* (1832) 131 ER 563, it has been held that the Crown has no precedence over a pledgee of goods. In *Bank of Bihar vs. State of Bihar* (cited supra), the principle has been recognised by the Supreme Court holding that the rights of the Pawnee who has parted money in favour of pawnor on the security of the goods cannot be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied.

23. In ***Isha Marbles vs. Bihar State Electricity Board* (1995) 2 SCC 648**, was case where the previous owners of a unit had the benefit of electricity supply and were borrowers from a secured creditor, the electricity arrears in respect of the premises had fallen due and the borrower had neglected to pay the same. The power had been disconnected in terms of section 24 of the Electricity Act. For recovery of loans, the properties of the borrower were brought to sale. The appellants therein were auction purchasers. The dispute was whether the auction purchaser was liable to meet the liability of the previous consumer of the electricity supply

to the premises purchased through the Finance Corporation. The Court held that as there was no charge over the property, the liability of the party would have to be determined in terms of the contract between the Electricity Board and the consumer and that the Board could not seek enforcement of contractual liability against a third party and accordingly upheld the contention of the auction purchasers. But it is now noticed that a larger Bench of the Supreme Court in the case of Ahmedabad Electricity Company v. Gujarat Inns Private Limited (2004) 3 SCC 587, has doubted the correctness of law laid down in Isha Marble's case, supra.

24. In the case of **Macson Marbles Pvt. Ltd.**

vs. Union of India 2003 (111) ECR 810 (SC), the Apex Court while considering the question, whether industrial unit sold in terms of section 29 of the State Financial Corporation Act would be sale made by the owner of the property and whether Rule 230(2) of the Central Excise Rules, 1944 would be attracted, held, that when sale made in favour of Financial Corporation provisions of Rule 230(2) of the Central Excise Rules would be attracted. The Court further held that the Act and the Central Excise Act are the special enactments and that unless in the operation of the same any conflict arises, it would not be necessary to examine which

of them would prevail as there was no conflict in that particular case.

25. In the case of **Sutani Textiles & Fabrics (P)**

Ltd. vs. Asst. Collector of Customs and Central Excise 1999 (106) ELT 296 (AP)= 1998 Company Cases

165, the Andhra Pradesh High Court was pleased to hold that in the case of secured creditor, the right of a secured creditor prevail over the excise dues of the Excise Department and that the secured creditor will have preferential claim even against the demand of the Central Excise dues of the Government.

26. In the case of **KSIDC Ltd. vs. Secretary,**

Ministry of Commerce 2005 (187) ELT 12 (Kar), the question before the Karnataka High Court was with respect to preferential right of recovery of dues under the provisions of the State Financial Act, 1951 and Customs Act, 1962. The Court after referring to the judgment of the Apex Court in the case of Bank of Bihar (supra), Isha Marbles, Macson Marbles P.Ltd (supra) and various other judgments of the other High Courts held that the Customs Department could claim priority of recovery of dues only in respect of those goods which had been imported and not in respect of others over which secured creditor claims their rights. Applying

principles laid down in Macson Marble P.Ltd. it was held that the petitioner therein would be liable to meet the customs duty as a successor of defaulting importer.

Consideration:

27. Having taken survey of law laid down by the Apex Court and various other High Courts holding the field and turning to the facts of the case at hand, it would be clear that the petitioner (SICOM) is the secured creditor, holding mortgage security in its favour. The property in question seized by the Customs has been mortgaged in favour of SICOM. In view of the Apex Court judgment in the case of Bank of Bihar (supra) and Dena Bank (supra) the claim of the secured creditor will have a priority over the dues of the Customs, since petitioner- SICOM is a secured creditor. The claim of the Customs Department cannot rank higher than that of the secured creditor. As held by the Apex Court in the case of Dena Bank (cited supra), the Crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or the principles of equity or good conscience (as applicable to India) do not accord to the Crown a preferential right for recovery of its debts over a

mortgagee or pledgee of goods of secured creditor. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply. In this case, the mortgage deed appears to have been executed in favour of the petitioner sometime in the year 1986 and 1988. Admittedly, liability of the Customs Department is subsequent to the execution of the mortgage deed. In this view of the matter, Customs can hardly claim priority over the dues of the petitioner-Corporation- SICOM.

28. Now, the contention of Mr. Pakale, learned Counsel appearing for the Customs, relying upon judgment of the Apex Court in the case of Isha Marbles or Macson Marbles P.Ltd. in the light of Rule 230(2) of the Central Excise Rules needs to be considered. The said Rule 230(2) reads as under:

230(2).
transfers or otherwise disposes of his business in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in the business or trade or part thereof by any other person or persons, all excisable goods, materials, preparations, plant, machinery, vessels, utensils, implements and articles in the custody or possession of the person or persons succeeding may also be detained for the purpose of exacting duty due from the producer, manufacturer or dealer up to the time of such transfer,

Where any such person

disposal or change, whether such duty has been assessed before such transfer, disposal or change, but has remained unpaid, or is assessed thereafter.

The aforesaid Rule, in our opinion, would hardly be applicable to the facts of the present case. The aforesaid rule only stipulates power to detain goods. It further gives power to detain goods or property on which Customs Department have charge, is transferred from one person to another. In this case, the said rule is not at all attracted.

29. The above view can also be justified on the basis of section 32-G read with section 169 of the Maharashtra Land Revenue Code, 1966 ('the Code' for short).

Section 32-G of the Code reads thus:

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32-G. Recovery of amounts due to

the financial Corporation as an arrear of land revenue- Where any amount is due to the Financial Corporation in respect of any accommodation granted by it to any industrial concern, the Financial Corporation or any person authorised by it in writing in this behalf, may without prejudice to any other mode of recovery of the amount due to it, and if the State Government or such authority, as that Government may specify in this behalf, is satisfied, after following such procedure as may be prescribed, that any amount is so due, it may issue a certificate for that amount to the Collector and the Collector shall proceed to recover that amount in the same manner as an arrears of land revenue."

Section 169 of the Code reads thus:

169. Claims of State Government to have precedence over all others: (1) The arrears of land revenue due on account of land shall be a paramount charge on the land and on every part thereof and shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage judgment-decree, execution or attachment, or otherwise howsoever, against any land or the holder thereof.

(2) the claim of the State Government to any monies other than arrears of land revenue, but recoverable as a revenue demand under the provisions of this Chapter, shall have priority over all unsecured claims against any land or holder thereof."

Section 32-G of the Code has been inserted in the principal Act by Sec. 21 of the State Financial Corporations (Amendment) Act, 1985 (Act No.43 of 1985). The State Financial Corporations had already three modes of recoveries of the loans due to the industrial concerns.

(1). The Corporation may take over the industrial Concern and recover the loan by sale of assets under sec.. 29 of the Act.

(2). Under sec. 31(1), the Corporation may apply before the District Judge for attachment and sale of the industrial concern and realise the amount due.

(3). By sale of mortgaged property also the Corporation could realise the loan amount under the provisions of sec.68 of the Transfer of Property Act.

Section 32-G provides the fourth mode of recovery of loan amount as arrears of land revenue through Collector by issuing certificate. It is simply a summary procedure and most effective method. This section can be invoked when any amount is due to the Financial Corporation from industrial concern. This amount must be due in respect of any accommodation granted by Corporation to the industrial concern. The amount due includes the principal amount and the interest accrued thereon according to agreed rate of interest. When payment has become due and it is not paid the occasion arises to invoke the provisions of the section. This is a special provision under the Act to enforce recovery of dues without effecting other modes of recovery .

30. Turning to provisions of sec. 169 of the Code, sub-section (1) provides that the arrears of land revenue due on account of land shall be paramount charge on the land and every part thereof and shall have precedence over any other debt, demand or claim whatsoever, whether in respect of mortgage, judgment-decree, execution or attachment,

or otherwise howsoever, against any land or the holder thereof. Sub-section (2) provides that claim of the State Government to any monies other than arrears of land revenue, but recoverable as a revenue demand under Chapter II, shall have priority over all unsecured claims against any land or holder thereof.

31. It is thus clear that the arrears of land revenue dues on account of land shall be paramount charge on the land or every part thereof. These will have precedence over any other dues, debts, demand, or claim. But other claims of the State Government which are recoverable as arrears of land revenue get priority over all unsecured claims against any land or holder. In the case of secured loan of the Government and other creditors, priority will depend upon precedence of such loan. It is thus clear that security of the Corporation being prior in point of time, it being in the nature of mortgage of property, the dues claimed by Corporation will have priority over the dues of Customs.

32. In the result, petition succeeds. The impugned seizure of the property seized by the Customs Department is quashed and set aside. Rule is made absolute in terms of prayer clause (a) with

no order as to costs.